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In the Supreme Court of the United States

OCTOBER TERM, 1959

No. 658

BENJAMIN FRANKLIN COLLINS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. 21-26) is reported at 272 F. 2d 650.

JURISDICTION

The judgment of the court of appeals was entered December 3, 1959. A petition for rehearing was denied on December 31, 1959. The petition for a writ of certiorari was filed on January 26, 1960. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether, on a charge of perjury in swearing that certain documents had been signed in 1953, proof by experts that the type design of the typewriter used to prepare the documents was not available until 1955 satisfied the quantum of proof required for perjury cases.

2. Whether petitioner was fairly treated before the grand jury at which he gave the testimony on which the perjury charge was based.

STATEMENT

In the United States District Court for the Southern District of New York, petitioner, secretary-treasurer of a local union, was convicted of perjury on two counts and sentenced to imprisonment for three years on each count, the sentences to run concurrently (R. 231-232).

The perjury charged was that petitioner testified under oath before a grand jury that he signed certain minutes of the local before April 1, 1953 (count 1; R. 5-6) and others before October 1, 1953 (count 2; R. 7-8). The minutes were dated March 11, and September 9, respectively (R. 37). On April 24, 1957, before the grand jury, petitioner testified that he signed them shortly after they were typed up a few days after the date thereof. While he would not specify the exact date of signing, he stated positively in each instance that the minutes were signed before April 1, 1953 and October 1, 1953, respectively (R. 50, 53-57). He reiterated this testimony at the ses-

sion of May 1, 1957, after he was given an opportunity to read over the minutes and asked whether anything had been changed (R. 59-71). He again repeated this testimony on May 8, 1957, after he had been told that the grand jury wanted nothing but the truth (R. 72-74).

To show the falsity of the petitioner's testimony, the government offered the testimony of an employee of the International Business Machines Corporation (Smith) who had designed the Prestige pica type for that company's electric typewriter. He testified that the minutes involved in this case were typed on a typewriter with Prestige pica type (R. 76-81); that he had not completed the design of that type until the latter part of 1954, and that the typewriters with such type were offered for sale in February 1955 (R. 74-76). An F.B.I. document examiner (Rogers) testified that the minutes were typed on an I.B.M. typewriter having serial No. 446239 (R. 96-97). A typewriter with that serial number had been purchased by the union in March 1956 (R. 94; see R. 185).

In submitting the case to the jury, the judge charged (R. 184-185):

> The witness Smith testified that he developed a certain design of type called Prestige pica. Because of his long experience in the field and his knowledge of the various styles of type in use, Smith was able to give the expert opinion that the minutes of September 9, 1953 and March 11, 1953 were prepared on a typewriter using the Prestige pica type design. Since he developed this style himself he could and did

> testify from his own knowledge that, except for two prototype typewriters, each of which was under the control at all times of the International Business Machines Company, there was not in existence prior to February, 1955, any typewriter which could have typed the minutes of September 9, 1953 and March 11, 1953.
>
> The evidence given by the witness Smith is the direct evidence of a living witness necessary to support a perjury conviction under the special rule of law applicable to perjury cases which I have explained to you.
>
> * * * * *
>
> The testimony of the witness Rogers and the exhibits introduced through that testimony are corroborative of the testimony of Smith to the effect that Local 299 of the Teamsters Union could not have had available a typewriter with Prestige pica type at the time the minutes dated September 9, 1953 and March 11, 1953 were purportedly prepared and signed.

The court of appeals affirmed the conviction, finding that there was sufficient evidence to support the conviction for perjury. It stated that it did not need to decide whether the evidence was "direct" since the true issue was whether the evidence was of a quality to assure that the guilty verdict was solidly founded; and that the testimony offered by the government in this case "although in a sense circumstantial" was "more convincing than would be the recollection of one or two witnesses that he [petitioner] had signed the minutes at a certain date later than the date sworn to by him" (Pet. 24).

ARGUMENT

1. Petitioner argues that the court of appeals has enunciated a new rule as to what constitutes "direct evidence" in a perjury case and that, in any event, the theory of the court of appeals was not submitted to the jury since the judge charged that the testimony of the I.B.M. designer was that of a "living witness" (Pet. 12-16). Actually, although the phraseology is different, the case was submitted to the jury and affirmed by the court of appeals on the same fundamental rationale, which has the support of early common law and later cases. The "direct testimony" of a witness within the special perjury rule does not require only eye-witness testimony, but means testimony which is direct in the sense that, in and of itself, it has a rationally direct and compelling tendency to establish the fact to be proved, even though some process of interpretation may be necessary.

One of the earliest statements of the quantitative rule in perjury was that given by Parker, C.J., in his charge to the jury in *Regina* v. *Muscot*, 10 Mod. 192 (1714), and this formulation does not even use the term "direct". The charge was as follows:

> There is this difference between a prosecution for perjury and a bare contest about property, that in the latter case the matter stands indifferent; and, therefore, a credible and probable witness shall turn the scale in favour of either party; but in the former, presumption is ever to be made in favour of innocence; and the oath of the party will have a regard paid to it until dis-

> proved. Therefore, to convict a man of perjury, a probable, a credible witness is not enough; but it must be a strong and clear evidence, and more numerous than the evidence given for the defendant; for else there is only oath against oath.

In *Regina* v. *Hook*, 27 L.J.M.C. (N.S.) 222, 31 L.T. (O.S.) 221 (1858), the English court accepted, as direct proof of the falsity of a policeman's testimony that he had not seen anyone leave a publican's house, evidence that the policeman had shortly before stated a number of times that he had seen such persons leave the house, plus the corroborating circumstance that people did in fact leave the house at the specified time. There was no "direct" evidence, in the sense petitioner uses "direct", to show that the policeman did see the people leave. The testimony adduced was "direct" because it logically and compellingly tended —directly and unequivocally—to establish the fact to be proved.[1]

The so-called "exception" to the quantum of proof requirement in perjury laid down by this Court in the early case of *United States* v. *Wood*, 14 Pet. 430—that testimony of a living witness is unnecessary when the falsity of the oath is proved by documentary evidence emanating from the defendant—

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[1] See also *Berwick's Case*, Foster, *Crown Cases and Crown Law*, p. 10, 18 How. St. Trials 367 (1746), a treason case, where testimony that, after a rebel garrison had surrendered, the defendant appeared in the prison set aside for officers and gave his rank, was held to be, not a mere confession after the fact, but an act constituting direct evidence of treason. (See the subsequent comment thereon, Foster, *Crown Cases and Crown Law*, pp. 243-244.)

is really an application of the philosophy found in the early English cases that evidence which directly and compellingly tends to establish the fact to be proved is sufficiently direct to satisfy the rule for perjury cases. The court of appeals was therefore correct in saying that the evidence here could be considered as "akin to the use of documents signed by the witness" under the *Wood* holding (Pet. 24). And the district court was also correct in saying that the type of evidence offered here, based on the direct knowledge of the designer as to when the typewriter came into being, was the "direct" testimony of a witness as that term is used in the usual statement of the perjury rule.

There is no conflict of circuits on this issue. The cases cited by petitioner as involving a conflict in principle (Pet. 13) all involved situations in which the testimony offered did not have the direct probative force of the documents involved in *Wood* or the expert testimony here. Indeed, *Radomsky* v. *United States*, 180 F. 2d 781 (C.A. 9), cited by petitioner, draws the very distinction between circumstantial and direct evidence which we think is the correct interpretation of the perjury rule. The court there said (180 F. 2d at p. 783):

> Circumstantial evidence is that which establishes the fact to be proved only through inference based on human experience that a certain circumstance is usually present when another certain circumstance or set of circumstances is present. Direct evidence establishes the fact to be proved without the necessity for such inference. These are abstract definitions but an un-

derstanding of them is necessary in order that a proper appraisal of the evidence in a given case may be made. Of course, the distinction between circumstantial and positive evidence must be taken in a practical sense. Thus, if a witness had testified to seeing someone other than appellant mail the letter it would be direct evidence that appellant did not mail it notwithstanding the necessity of an inference based on experience that a letter deposited in the mail by one person cannot, before arriving at its destination, have been deposited in the mail by another person. The possibility of the letter's being mailed twice is so negligible that the evidence would be direct for all intents and purposes. * * *

2. The contention that petitioner was unfairly treated before the grand jury (Pet. 16-19) is completely refuted by the record. Far from attempting to pin petitioner down to a specific date for his actual signing of the minutes, government counsel, time and again, indicated that all he was trying to do was to make certain that the minutes were signed within some reasonable time after the date of the meeting allegedly reported—that they were not signed years later (R. 54-55, 56-57, 60-61, 63, 69-71, 73-74).[2]

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[2] See, *e.g.*, at R. 54:

"Q. So you did not sign these minutes of March 11, 1953—let's play safe—is it your sworn testimony that you did not sign these minutes of March 11, 1953 after April of 1953? A. Yes, sir."

R. 56:

"Q. Let me ask you, did you sign these minutes of September 9, 1953, within the last month, Mr. Collins? A. No, sir."

Petitioner was given every opportunity to tell the truth and was warned of his privilege against self-incrimination (R. 50, 62, 72). The reminder of the penalties for perjury was part of the attempt to assure petitioner that what the grand jury wanted was the truth (R. 72). Petitioner's decision to lie was not the result of misconduct or pressure by the government.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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